IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 23, 2008 Session

STATE OF TENNESSEE v. TOMMY JOE OWENS

Appeal from the Criminal Court for Campbell County
No. 12314 E. Shane Sexton, Judge

No. E2007-02296-CCA-R3-CD - Filed December 22, 2009

On June 14, 2004, the victim, H.S.[1] was recovered by police officers from a private home and brought for treatment to the East Tennessee Children's Hospital. The doctors treated the child for multiple injuries including a cauliflower ear, a broken nose that had healed incorrectly, and eyes matted shut from a chemical burn. Appellant, Tommy Joe Owens, is the father of the victim. A Campbell County Jury convicted Appellant of three counts of aggravated child abuse and one count of aggravated child neglect. He was sentenced to twenty-five years for each aggravated child abuse conviction and to twenty years for the aggravated child neglect conviction to be served consecutively for an effective sentence of ninety-five years. Appellant bases his appeal on the following issues: (1) whether the trial court erred in denying Appellant's motion for judgment of acquittal; (2) whether taped statements of a non-testifying witness constituted *Brady* material; (3) whether the trial court properly denied Appellant's request to call the Assistant District Attorney as a witness; (4) whether the trial court erred by failing to require the State to disqualify itself as prosecutor; (5) whether the trial court erred in failing to assist Appellant obtain access to a witness; (6) whether the trial court erred in allowing photographs of the victim into evidence; (7) whether the trial court erred in limiting the testimony of Appellant's expert witness; (8) whether the trial court erred in imposing Appellant's sentences; and (9) whether the trial court denied Appellant a public trial. After a thorough review of the record, we reverse Appellant's conviction for aggravated child abuse with regard to the injury to H.S.'s nose. We affirm the other two aggravated child abuse convictions. In addition, we conclude that Appellant's sentences must run concurrently, rather than consecutively. Therefore, we affirm in part, reverse in part, modify in part, and remand to the trial court for entry of judgment in accordance with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed in Part; Reversed in Part; Modified in Part and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and DAVID H. WELLES, J., joined.

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[1] It is the policy of this Court to refer to minor victims by their initials.

J. Stephen Hurst, LaFollette, Tennessee, for the appellant, Tommy Joe Owens.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; William Paul Phillips, District Attorney General and Scarlette E. Ellis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

R.S.[2] is the mother of H.S. H.S. was born on March 6, 2001. R.S. and Appellant lived together around the time that H.S. was born. They lived across the street from Appellant's parents. While they were living together, Appellant was officially declared to be H.S.'s father following DNA testing. R.S. and Appellant separated in 2002. R.S. and Appellant briefly reunited but separated again. The second time they separated, R.S. and H.S. went to live with R.S.'s grandmother. After R.S. and Appellant separated, Appellant rarely visited H.S. On November 10, 2003, H.S. was with Appellant for a visit. At the conclusion of the visit, Appellant refused to return H.S. to R.S. R.S. had to enlist the Sheriff's Department to get H.S. back from him. R.S. had custody of H.S. at the time. There was no court order imposing regular visitation between Appellant and H.S.

Shortly before the incident when Appellant would not return H.S. to R.S., R.S. was served with papers informing her that Appellant had taken out an order of protection against her. Appellant's petition alleged that both he and H.S. were in danger of being hurt by R.S. The papers informed her of the court date on December 17, 2003. On that date, R.S. and H.S. were both sick, so R.S. did not appear. On the same date, December 17, 2003, two officers arrived at R.S.'s house and took H.S. away. Appellant obtained custody through the trial court's order, and R.S. did not see H.S. again until after June 16, 2004. R.S.'s grandmother and sister also attempted to see H.S. during that time period but were denied access to her. R.S. refrained from attempting to contact Appellant because of the order of protection entered by the court.

H.S. had a regular pediatrician, Dr. Hasnain, when she lived with her mother. H.S. had regular shots when she was a baby. When H.S. was taken from R.S., she did not have any of the injuries that were present when R.S. was taken to the hospital on June 16, 2004, and she was not malnourished. After H.S. was discharged from the hospital, H.S. was placed in foster care for about three months. R.S. then obtained custody of H.S., and she retained custody of the child. After H.S. was returned to her, R.S. was given Mederma to help with H.S.'s scarring. At trial, R.S. testified that H.S.'s nose and ear required reconstruction through cosmetic surgery.

Connie Napier, the bookkeeper for Cooper Ridge Mining Company, testified that Appellant worked for the mining company from February to June of 2004. He worked a regular forty hour

[2] In order to further protect the identity of the victim, we will also refer to the victim's mother by her initials. Other minors were involved in the facts of this case. We have chosen to refer to them by their initials throughout this opinion.

week. The employees of the mining company did not work on Sundays.

On April 25, 2004, Aletha Mattie saw Appellant and his girlfriend, Charlotte Claiborne, in their Blazer in the Old Woodson's parking lot. Appellant was in the store, and Ms. Claiborne was in the driver's seat. Ms. Mattie had met Ms. Claiborne but did not know either Ms. Claiborne or Appellant personally. H.S. was in the backseat of the vehicle lying face down. Ms. Claiborne left the vehicle, and H.S. looked up at Ms. Mattie. H.S. tried to speak to her, but she could not. H.S. began to pick things out of the floorboard and put them in her mouth. Ms. Mattie thought she was trying to eat them. When H.S. heard Ms. Claiborne return, the victim put her face back down into the seat. When Ms. Mattie saw H.S. she gasped. Ms. Mattie described the victim's condition in the following manner:

> [A] busted nose which was bleeding, you know, pretty badly from her nose down into her mouth onto her shirt. It looked like her eyes were starting to turn black. In the front of her hair it was – looked like hand pulls, you know, it looked like it had been pulled out in circles on the top of her hair.

Ms. Mattie believed the nose injury to have been recent because the child's nose was still bleeding pretty badly. The hair loss was on the right side of H.S.'s head.

When she saw H.S., Ms. Mattie asked Ms. Claiborne what had happened. Ms. Claiborne replied that H.S. had had a bicycle wreck. Ms. Mattie asked if they had taken the child to see a doctor, and Ms. Claiborne replied that they had. Ms. Mattie stated that H.S. was tiny, and she believed her to be around eighteen months old.

Ms. Mattie was not convinced by Ms. Claiborne's explanation and returned to her vehicle to call 911. She gave them a description of the vehicle and told the operator that she was suspicious that a child was being abused. Ms. Mattie also called other family members and urged them to call the authorities to check on the child. Ms. Mattie could recall the exact date because she wrote it down in her calendar.

About a week before June 16, 2004, Teresa Draughn and Judy Bohrer went to pick up Ms. Claiborne around 10:00 or 10:30 p.m. because her car had broken down, and she needed a ride home. H.S. was with Ms. Claiborne when they arrived. Ms. Claiborne had a blanket over H.S. and said that she was asleep when she got into the backseat with H.S. Ms. Bohrer's six-year-old son was with them. When they arrived at Appellant's home, Ms. Bohrer noticed that the house was filthy. Her six-year-old son told Ms. Claiborne that she needed to clean the house because "it stinks." Ms. Bohrer considered the condition of the house "beyond nasty."

After Appellant and R.S. separated, Appellant started living with Ms. Claiborne in the same house across from Appellant's parents. Tina Cantrell lived next door to Appellant and Ms.

Claiborne. She saw H.S. on two occasions after Appellant gained custody of H.S. Ms. Cantrell first saw H.S. a few days after Appellant obtained custody. Ms. Claiborne brought H.S. to Ms. Cantrell's home because Ms. Claiborne was going to be out. Ms. Cantrell testified that H.S. had a bad chest cold but had no injuries out of the ordinary for a small child. H.S. had a small mark on her neck, but it was not anything unusual for a small child. Ms. Cantrell did not see any parts of H.S.'s body that were covered by clothes. The second time she saw the child was in either May or June of 2004. It was about two weeks before H.S. was taken to the hospital. Ms. Claiborne was having car trouble, so Ms. Cantrell took Appellant to Ms. Claiborne and her car. Appellant asked Ms. Cantrell to take H.S., A.L., Ms. Claiborne's daughter, and K.O., Appellant's daughter, home. A.L. got H.S. out of Ms. Claiborne's car and put H.S. in Ms. Cantrell's car. H.S. was dressed in socks and shoes, pants, and a hooded sweatshirt. The hood of the sweatshirt was tied around H.S.'s head. Ms. Cantrell could only see from the middle of the child's eyes to the tip of her nose. Ms. Cantrell testified that she did not notice any injury to the victim's eyes. Ms. Cantrell asked Ms. Claiborne why she had the hood tied around the child's head. Ms. Claiborne replied that H.S. had an ear infection, and when the ear was exposed to the air, it bothered H.S.

Ms. Cantrell also tried to help R.S.'s grandmother and sister see the child. R.S.'s sister or grandmother would speak with Ms. Claiborne who would tell them a time to come over to the house. When they would arrive, no one would be home. Ms. Cantrell began to watch for when Ms. Claiborne would be home with the children. On June 11, 2004, R.S.'s sister attempted to see H.S. On that day, Ms. Cantrell heard her telephone ring and went to answer it. When she looked out the window she saw R.S.'s sister sitting in Appellant's driveway in her car. Ms. Claiborne was the caller and told Ms. Cantrell that H.S. had been in a terrible bicycle accident and it had really "messed up her face and the side of her head." Ms. Claiborne told Ms. Cantrell that she was taking H.S. to the hospital. Ms. Cantrell went out to tell R.S.'s sister who began calling the area hospitals but never found where H.S. was. When Appellant returned home, Ms. Cantrell told him that Ms. Claiborne had taken H.S. to the hospital. He too began unsuccessfully calling area hospitals to find out where they were and left shortly thereafter. Ms. Cantrell did not see either Appellant or Ms. Claiborne return to the house.

On June 16, 2004, Officer Jason Heatherly, with the Jacksboro Police Department, went to Appellant's house to arrest Ms. Claiborne in connection with a theft and forgery investigation. He arrived at 12:17 p.m. When he knocked on the door, he received no answer but could hear children talking and moving about inside the house. He called the county sheriff's office and was joined at 12:28 p.m. by Officer Mike Starrett, with the Campbell County Sheriff's Department. Until Officer Starrett arrived, Officer Heatherly continued to try to get someone to come to the door. He also walked from the front of the house to the back to try to prevent anyone from leaving the house by the back door. He could not see the back door while standing at the front door. Officer Heatherly testified that he could see Ms. Cantrell's residence from the front porch and did not see anyone go to Ms. Cantrell's house.

Ms. Claiborne and Appellant came to the door about one minute before Officer Starrett arrived. There were no children in the house whom the officers could see. Officer Heatherly

arrested Ms. Claiborne, and Officer Starrett recognized Appellant as having outstanding warrants for failure to appear in court and arrested him. After obtaining permission, the officers searched the residence for stolen property and drugs and did not see any children. Officer Starrett had placed Appellant in the patrol car when a gentleman approached him. The gentleman stated that he was Appellant's father. He asked Officer Starrett about his grandchildren who were inside the residence. Officer Starrett told him that there were no children inside the house, but Office Starrett conducted another search of the house to be certain. He thoroughly searched the residence and found no children. Officer Heatherly specifically asked Appellant whether there were any children at the house, and Appellant told him that the children were at a neighbor's house.

The same day, K.O. came to Ms. Cantrell's house and attempted to call Teresa Draughn. Ms. Draughn subsequently called Ms. Cantrell's home. Ms. Cantrell informed her that Appellant and Ms. Claiborne had been arrested. Ms. Draughn told Ms. Cantrell she would send someone to pick up the children from Appellant's home and bring them to Ms. Draughn's house.

Ms. Draughn called her friend Lisa Smith to pick up the children at Appellant's house. When she arrived, she and Ms. Draughn's daughter went to the door of the house. A.L. answered the door. Ms. Smith went into the house and saw that the house was "really filthy." A.L. was carrying the victim out of the house. H.S. was wrapped in a sheet, and all Ms. Smith could see of H.S. was her face. When Ms. Smith saw the child's face she became alarmed and asked what had happened to her. A.L. replied that the child had been stung by bees and was allergic to them. Ms. Smith saw that H.S.'s eyes were swollen shut and that she had a bruise on her head. Ms. Smith told A.L. that H.S. needed to go to the hospital. A.L. stated that Ms. Claiborne had already taken her to the hospital, and H.S. had to go back on a Friday. As soon as they arrived at Ms. Draughn's house, A.L. took H.S. to the bedroom. Ms. Smith spoke with Ms. Draughn and told her that she needed to take H.S. to the hospital. Ms. Draughn told Ms. Smith that H.S. just needed some Benadryl. Ms. Smith left and called to urge Ms. Draughn to take H.S. to the hospital. Ms. Draughn refused and said she needed to get Appellant out of jail first. Ms. Smith called the Department of Children's Services ("DCS") and the Sheriff's Department. She did not get any immediate results.

Ms. Smith spoke with Ms. Draughn again around 6:00 p.m. when Ms. Draughn called Ms. Smith to ask for Neosporin because Ms. Draughn had fallen and was bleeding. Ms. Smith took the Neosporin and some Band-aids to Ms. Draughn's house. Ms. Smith saw Appellant on the porch talking on the telephone when she arrived at Ms. Draughn's house. Appellant left when Ms. Smith arrived. While she was there, she tried to see H.S., but A.L. and K.O. were lying on the bed on either side of the child holding down a sheet. A.L. and K.O. would not let Ms. Smith see the child. H.S. was covered by the sheet up to her neck. Ms. Smith again urged Ms. Draughn to take H.S. to the hospital. Ms. Draughn refused. Ms. Smith went home and called the sheriff's office again. At some point during the evening, Ms. Smith was on a three-way call with Ms. Draughn and Judy Bohrer. Ms. Draughn asserted that H.S. was in this condition when Appellant obtained custody, but Ms. Bohrer did not agree with Ms. Draughn's assertion.

Cinthia Feduik lived behind Appellant's parents and could see Appellant's house from her

parents' house. On the evening of June 16, 2004, between 7:30 and 8:00 p.m., she saw Appellant burning some brush near his house.

Ms. Bohrer took a vacuum cleaner to Ms. Draughn around 1:00 or 2:00 p.m. on June 16, 2004. Before she took the vacuum to Ms. Draughn's house, she participated in the three-way telephone conversation with Ms. Smith and Ms. Draughn. Ms. Smith was very insistent during the telephone call that H.S. was not suffering from pinkeye or bee stings. When she took the vacuum to Ms. Draughn's, Ms. Bohrer attempted to look at H.S., but either A.L. or K.O. refused to let Ms. Bohrer see the child. H.S. was covered by a sheet, but Ms. Bohrer could see that the child's eyes were red and swollen and that her lip was scraped. Around 4:30 p.m., Ms. Bohrer called DCS about H.S. Ms. Bohrer returned to Ms. Draughn's house to try to see H.S. again. Once again, either A.L. or K.O. would not let her see the child. Ms. Bohrer called Ms. Draughn and urged her to take H.S. to the hospital. Ms. Draughn told Ms. Bohrer that Appellant had just arrived at the house.

Officer Darrell Mongar arrived at Ms. Draughn's house on the evening of June 16, 2004, around 9:30 p.m. He was responding to a call that a child at the residence had eyes that had been beaten shut. He spoke with Ms. Draughn, who took him into a bedroom in the house. Ms. Draughn called for H.S. but got no response. She looked around the bottom bunk of the bunk bed and did not find her. Officer Mongar looked on the top bunk and found H.S. under two thick blankets. H.S.'s back was to him. He began to rub her back to try to wake her up. When he rubbed her back, her shirt came up, and he saw that H.S.'s back was discolored. He asked Ms. Draughn what the discoloration was, and she responded that it was psoriasis. H.S. scratched her foot when she was waking up, and Officer Mongar saw that the back of her foot was burned. He continued to try to wake up H.S. When she rolled over, Officer Mongar saw burns on her face and told dispatch to send an ambulance. He also called for his sergeant to come. Officer Mongar picked up H.S. and carried her outside. He held her outside until the ambulance arrived. He stayed with the victim at the hospital until the next afternoon. While at the hospital, he photographed all of the victim's injuries. After downloading the photographs, he returned to the hospital.

Charles Scott is the Chief Deputy Sheriff of Campbell County. On the evening of June 16, 2004, he was called at home regarding a severe child abuse case. He went to the emergency room at the hospital. He saw the child and spoke with other officers who were at the hospital. While at the hospital, Deputy Scott notified another officer that he wanted to speak with Appellant. Appellant was spotted by an officer and brought to the Campbell County Sheriff's Department. Deputy Scott went to the sheriff's department to speak with Appellant. Deputy Scott advised Appellant of his *Miranda* rights. After Appellant signed a waiver, Deputy Scott began to interview Appellant. At the interview, Appellant stated that he was H.S.'s father and that he had full custody of her. He stated that he had had full custody since December of 2003. He took H.S. to the emergency room when he got her in December of 2003 but had not taken her to the doctor since. Appellant admitted to Deputy Scott that he had seen the injury to the victim's ear. Appellant told him that Ms. Claiborne had taken H.S. to the doctor, and the injury had been caused when two of the older children were pushing H.S. on a bike and she fell into the porch. With regard to the victim's thin hair and bald patches, Appellant stated that her hair had been falling out and there was greenish stuff in her hair.

Ms. Claiborne had spoken with a nurse who told her it was psoriasis. Appellant and Ms. Claiborne went to Walmart and purchased some medicated shampoo. Appellant also told Deputy Scott that he did not know of anything that was wrong with the victim. He denied that there were any cuts, bruises or marks and that he had given her a bath about a week and a half before and did not notice anything. Appellant denied that there were any bruises on the victim's forehead. He said that H.S. had a very good appetite and no digestive disorders. When asked about the victim's eyes that were swollen and matted shut, Appellant replied that she had been stung by bees. Appellant told Deputy Scott that his nine-year-old daughter, K.O., and Ms. Claiborne's twelve-year-old daughter, A.L., also lived in the home. Appellant told Deputy Scott that he had taken the children to Ms. Draughn's house on June 16 because Ms. Claiborne had been arrested. Later during the interview, Deputy Scott told Appellant that H.S. had a burn on her bottom. After hearing this information, Appellant stated that he lied about giving the victim a bath.

After he interviewed Appellant, Deputy Scott went to Appellant's house. When he arrived he found a still smoldering pile of trash. The entire residence was filthy. He found both dog feces and human feces, clothing, and old dishes with leftover food on the floor. He found both Windex and Clorox Fresh Care cleaning products sitting on the kitchen table, which was also covered with food.

Dr. Mary Campbell provided emergency room services at the East Tennessee Children's Hospital and conducted subspecialty consults in the area of child abuse and neglect. On June 16, 2004, Dr. Campbell examined the victim, H.S. When the child arrived, she had injuries all over her body. It took three hours to document all of the victim's injuries. The child was also emaciated. One specific injury was that her eyelids were matted shut and crusted. H.S. had multiple injuries to her head, including hair loss, two areas of contusions on either side of her head, her nasal bridge was completely flattened against her head, irregular areas of scabbing on her lips, and a swollen upper lip. There was bruising across her left ear. The victim's right ear had a cauliflower deformity. A cauliflower deformity is caused when the ear is injured in such a way as to trap blood between the cartilage and skin of the ear. Consequently, the blood flow to the cartilage is cut off and the cartilage dies. The ear then folds over on itself. Dr. Campbell estimated that this injury most likely occurred months before her examination. She also testified that the type of injury to cause a cauliflower ear is a direct blow to the ear. The blood clot caused as a result of the injury would have appeared fairly immediately and would have been apparent. She concluded that if the victim's ear had been treated immediately, the doctors could have drained the ear, and the deformity could have been avoided.

After examining H.S.'s eyes, Dr. Campbell surmised that the injury was likely caused by a chemical that had hit the eye causing an inflammatory reaction, such as a burn. She opined that this injury occurred one to two weeks before the examination. Because the injury from the chemical was restricted to the eyes, Dr. Campbell did not believe that the child had fallen in a pool of chemical but that it was more likely that something splashed, thrown or sprayed into the child's eyes. Windex or any household chemical could have caused such an injury. During surgery, the surgeon was unable to separate the eyelids from her cornea so that he could completely open the victim's eyes. After surgery the eyelids were able to separate from the cornea, and the victim could open her eyes.

She also concluded that the contusions on either side of the victim's head occurred sometime within a week prior to the examination. With regard to the injury to the victim's nose, Dr. Campbell testified that the area that separates the nostrils had been injured and had healed in such a way that one of the victim's nostrils was no longer visible. The nose injury most likely occurred between weeks to months before the examination.

As stated above, H.S. was emaciated at the time of her examination by Dr. Campbell. She was also dehydrated. Dr. Campbell stated that the victim was in the third percentile for her age group with regard to size and weight. The victim's heart rate was elevated which is consistent with someone who was malnourished. During her five-day hospitalization, the victim gained five pounds. Dr. Campbell obtained the victim's growth records from her primary care physician and used these records to plot the victim's growth over time. Until the victim was thirty or thirty-three months old she continued to fall within her expected percentage for her growth rate, which was between the tenth and twenty-fifth percentile. She was never below the tenth percentile for her weight. When she arrived at the hospital in June of 2004, she was thirty-nine months and was lower than the third percentile for her weight. At the time of her discharge, the victim's weight returned to the twenty-fifth percentile based upon her five pound weight gain at the hospital. Dr. Campbell opined that in an adult the weight loss would be comparable to a 140 pound adult losing twenty to forty pounds in six months.

H.S. also had many injuries on her back, lower back, buttocks and inner thighs. A few injuries to her back had a hook-like appearance which Dr. Campbell said was consistent with a hanger. Another set of injuries had three similar protrusions and would be consistent with a table fork. Dr. Campbell also identified another injury as a burn, most likely caused by a hot liquid, that extended eight inches. On both the victim's buttocks and upper back there were two distinct, consistent lines that were burns most likely caused by immersion. In addition, the child had injuries to her inner thighs and genital area also caused by an immersion. The left side of the child's genital area was especially swollen. Dr. Campbell testified that it could be due to swelling as a result of the immersion burn or an infection. While H.S. was in the hospital, the injury to the left side of her genital area healed, and the swelling went down.

Dr. Campbell testified that H.S. had three circular burns on her genitals that were consistent with cigarette burns. The child also had lacerations on her stomach near her belly button. Dr. Campbell also testified to several other injuries, including some triangular-shaped tears that were most likely the result of scraping an object on the upper, front part of the victim's body.

H.S. also had injuries to her arms and legs. On her arms there were several ovoid-shaped injuries. These injuries were consistent with a thumb print due to grabbing the child's arm. She also had a scraping injury on her elbow. The victim's feet were particularly injured, presumably from another burn because the injury area was quite extensive. In addition, H.S. had several triangular-shaped cuts and tears on her feet. Dr. Campbell testified that the injuries to the victim's feet were not healing well at the time she was brought in for examination. H.S. also had bruises on her left leg. At least one bruise on her leg was most likely caused by some sort of looped cord or a coat

hanger. The back of the child's foot also had an extensive injury that was most likely an immersion burn.

H.S. also had multiple linear marks on her upper back and cuts between her fingers that were consistent with something being whipped out of the child's hands. Also, the cuts between her fingers and cuts on her lips could have been due to poor healing because of malnutrition.

Dr. Campbell testified that immediate treatment of several of the injuries could have prevented the extent of disfigurement as well as disability, particularly the injuries to the nose, eyes, and ears. Dr. Campbell stated that due to the extent of the injuries on nearly every surface of the victim's body, she concluded that the injuries were intentionally inflicted. She also opined that several of these injuries would be considered serious injuries and would cause great pain. Dr. Campbell also stated that if H.S. had been subjected to the same, continuous caretaking as evidenced by the injuries and the malnutrition, the victim was suffering a substantial risk of death. In addition, the failure of anyone to seek medical attention for the victim's injuries compounded the seriousness of the injuries and allowed the consequences to worsen over time.

Dr. Gary Gitschlag is a pediatric ophthalmologist. On June 16, 2004, he treated H.S. for the injuries to her eyes. When he first saw H.S., her eyes were swollen shut, and he could not evaluate the extent of her injuries until she was under anesthesia in the operating room. He testified that when he first saw her she had abrasions and burns around the eyelids and mucous and debris were keeping the eyelids closed. To get H.S.'s eyelids open, Dr. Gitschlag had to cut off her eyelashes and separate her eyelids with a blade. He testified that the surface layer of H.S.'s cornea was degraded. He stated that a chemical burn is usually the cause of a complete abrasion such as the victim had on her cornea. For that amount of swelling and mucous to have been present, the injury would have had to have been there for some time or would have had to have happened repeatedly. Dr. Gitschlag estimated that the injury was more than a couple of days old. According to Dr. Gitschlag, the injury would have been very painful because "[t]he cornea is one of two areas with the highest concentration of sensory nerves in the body." He also stated that Windex or Fresh Care, which contains Clorox, could cause such an injury. Dr. Gitschlag said, however, that one squirt could not have caused such an extensive injury. It would have to have been several squirts or repeated episodes. In Dr. Gitschlag's opinion, the victim's eye injuries were not accidental. He based his opinion on the other injuries to the victim's body. Dr. Gitschlag stated that the injury has not caused any permanent visual change, but it could have. If the victim had been treated immediately after the injury occurred, the victim's eyes would not have become swollen and stuck shut. Dr. Gitschlag also stated that nothing about H.S.'s condition suggested a case of pinkeye or bee stings.

Detective Don Farmer is a captain and Chief of Detectives for the Campbell County Sheriff's Department. The morning after Deputy Scott interviewed Appellant and went to his house, Detective Farmer interviewed Appellant at the Sheriff's Department. Alice Shumate with DCS was also present. When asked about the victim's ear, Appellant replied that she had had a bicycle wreck and Ms. Claiborne had been taking care of the ear herself by putting medicine on it. Appellant told Detective Farmer that he had not taken H.S. to the doctor and that Ms. Claiborne was in charge of

medical care. Appellant admitted that he had noticed that the victim's eyes were puffy and that Ms. Claiborne had told him that she was taking care of them. When shown pictures of the victim taken at the hospital showing her various injuries, Appellant showed no emotion. Detective Farmer said that one time Appellant attempted to cry and put his hands over his eyes. Appellant told Detective Farmer that the injuries to the victim's eyes could have been chemical burns caused by methamphetamine. Appellant stated that Ms. Claiborne could have taken the victim to a place where people were cooking methamphetamine. Appellant admitted that he and Ms. Claiborne were weekend users of the drug. He did not accept responsibility as the victim's father for her injuries during the interview.

Appellant testified on his own behalf at trial. He stated that at the time he was arrested, he lived with Ms. Claiborne, the victim, his other daughter, K.O., and Ms. Claiborne's daughter, A.L. He got custody of H.S. right before Christmas of 2003. He and Ms. Claiborne had been living together about two years by that time. Appellant had been working as an underground miner for nine or ten years at the time of his arrest. Appellant testified that after he got custody of the victim, his relationship with Ms. Claiborne went "downhill." Ms. Claiborne and the two girls became jealous of the attention he was showing H.S. Things became noticeably worse in April of 2004. Around that time, the family went on a trip to Gatlinburg. Appellant had ample opportunity to observe the victim and did not notice any injuries to her head. On cross-examination, Appellant admitted that the date of the Gatlinburg trip would have actually been in February.

Appellant and Ms. Claiborne began using methamphetamine on the weekends in May. By the end of the month, he and she were using it every day. Appellant admitted that "[methamphetamine] clouded my judgment, I mean, as far as just paying attention and stuff." Around the first of June, Ms. Cantrell told Appellant that Ms. Claiborne was having car trouble. He asked Ms. Cantrell to take him to Ms. Claiborne, so he could fix the car. When he arrived, he worked on the car and told Ms. Cantrell to take Ms. Claiborne and the children home.

Appellant testified concerning what an average day was like in May of 2004. He stated that getting up at 11:30 a.m. would be an early day for him. When he got up, he would start trying to obtain methamphetamine. He would then return home, gather his belongings and go to work for his shift beginning at 3:00 p.m. His shift ended at 11:00 p.m., and Appellant would return home. Appellant worked Monday through Friday and occasionally on Saturday. Appellant was usually home on the weekends. The methamphetamine use did not affect his work. Ms. Claiborne and the older children would be up when he arrived home, but H.S. would be in her bed. H.S. would also be in bed when he got up in the morning. He did not go into her room to see her because of the jealousy exhibited by Ms. Claiborne, K.O., and A.L. On cross-examination, Appellant testified that on the weekends he would not wake up until 11:00 a.m., and H.S. was always asleep when he was awake.

Appellant did notice an injury to the victim's ear at the beginning or middle of May. He asked Ms. Claiborne what had happened. She told him that K.O. had been pushing H.S. on the bicycle and there was an accident. Appellant said he told Ms. Claiborne to take H.S. to the doctor.

She told Appellant she would handle the situation. Appellant testified that taking care of the children was the duty of the woman of a household. He stated that he never gave H.S. a bath. Appellant also stated that he had noticed the victim's "hair problem" at the end of April. Ms. Claiborne told him that it was psoriasis and that she was taking care of it. Appellant never treated H.S. He relied upon Ms. Claiborne. Besides the victim's ear and hair, Appellant could not believe what he saw in the photographs taken at the hospital. He denied inflicting any of the victim's injuries. On cross-examination, Appellant stated that he relied upon Ms. Claiborne for the care of H.S. and getting medical attention for the injury he saw to her ear and the hair loss he noticed. He admitted that he did not take it upon himself to check her injuries or take H.S. to the doctor himself.

When Appellant was arrested on June 16, 2004, he had been asleep. Ms. Claiborne woke him up to tell him the police were there. He did not see the children in the house when he was walking through the house. He was arrested for having a dog running at large. He was in jail for around an hour and a half. Ms. Claiborne was also arrested. When he returned to the house, there was a note saying that the children were at Ms. Draughn's. He stopped by Ms. Draughn's to tell her he was going to work and ask her to watch the children. After work he returned to get the children. Ms. Draughn told him she was getting ready to feed the children, so he could go home to fix his septic tank. He left but did not see H.S. before he left. Later that day, Appellant's mother came to his house to tell him that Ms. Draughn had called and said that the police had taken H.S. His mother told him that Ms. Draughn had mentioned child abuse. Appellant went to get K.O. While they were driving to the Sheriff's Department, a police officer drove up behind Appellant and activated his blue lights. K.O. began crying and saying that Appellant was going to go to jail because H.S. was hurt.

On cross-examination, Appellant admitted that he filed an order of protection against R.S. He stated that R.S. took some swings at him but never really hurt him. Contrary to his claim in the order that R.S. threatened to "blow his brains out," R.S. had never come after him with a gun. Around the time that Appellant filed the order of protection, he was due in court to review his child support payments to R.S. After Appellant got custody of H.S., he did not have to pay child support to R.S. anymore. Appellant admitted that when he got H.S. she did not have any injuries or signs of abuse.

James Hackler worked with Appellant at the coal mine sometime after February until Appellant was arrested in June. Because Appellant was having car trouble, Mr. Hackler would give Appellant a ride to and from work. Mr. Hackler testified that he went into Appellant's house once or twice a week. He estimated that he saw the victim on one or two occasions in March. He did not notice any injuries. In May, Mr. Hackler rode with Appellant, Ms. Claiborne, and H.S. to get some car parts. He noticed a scratch on H.S. but did not think it was an unusual injury. H.S. was dressed in long pants and a jacket. The victim's head was covered. Mr. Hackler testified that Appellant "bragged on his kids" and was fond of them.

Annette Owens is Appellant's mother and lived across the street from Appellant and Ms. Claiborne. When Appellant got custody of H.S., Mrs. Owens saw her almost daily. In April of

2004, Mrs. Owens had a discussion with Appellant about Ms. Claiborne's care of the children and the fact that Mrs. Owens was concerned. Appellant told her that he would take care of it. From that point on, H.S. was never in her house up to the time Appellant was arrested. On the day that Appellant was arrested, Mrs. Owens paid the fine to get him out of jail the first time when he was arrested for the dog charges. She offered to get the children from Ms. Draughn's house, but Appellant said that he would take care of it. Mrs. Owens later saw that Appellant was home around 10:00 p.m. Ms. Draughn called after that and told Mrs. Owens that "they took [H.S.]" and that K.O. and A.L. had taken off running. Mrs. Owens went to tell Appellant, and he left to find out what was happening. Mrs. Owens waited and decided to drive towards Ms. Draughn's house. She passed Appellant on the way there. They stopped and spoke. He told her that he had K.O. The police officers arrived at that time and arrested Appellant. Mrs. Owens asked the officers if she could take K.O. with her. They said she could, but she had to bring K.O. to the police station. The officers told Mrs. Owens about the extent of the victim's injuries.

On cross-examination, Mrs. Owens stated that she was a nurse. Appellant never asked her to look at any injuries on the victim's body. She admitted that she blamed Ms. Claiborne for the type of life they were living, but Appellant took responsibility for H.S., and "he should have been the father . . . ."

Donnie Owens is Appellant's father. He lived with Mrs. Owens across the street from Appellant. Mr. Owens also worked with Appellant at the coal mine as the production foreman, who was the "boss." He testified that there was a discussion between Appellant and Mrs. Owens in April and after that time he barely saw H.S. or K.O. On the day Appellant was arrested, Mr. Owens saw the police across the street. He walked over and asked what was happening. After he was told, he asked Ms. Claiborne where H.S. and K.O. were. She told him that they were with her mother and shook her head at him. The officers then asked if there were minors in the house. They searched the house and did not find any children. The officers left with Appellant and Ms. Claiborne to take them to jail. Mr. Owens went to see his wife to get a check so he could bail out Appellant. He got Appellant out of jail and took him home. Mr. Owens went to work at the mine. He heard that Appellant also went to work. The mines were not operating that day, so Appellant left to go get Ms. Claiborne out of jail. While Mr. Owens was at work, Mrs. Owens called him to tell him about H.S. being taken and Appellant's arrest because of H.S.'s condition.

K.O. is Appellant's daughter. She testified at trial on behalf of Appellant. At the time Appellant was arrested, she was nine years old. K.O. lived in the house with Appellant, Ms. Claiborne, and the other children. H.S. stayed in a bedroom by herself. K.O. testified that H.S. injured her ear in a bicycle wreck. According to K.O., she was holding onto the bicycle and let her go. H.S. ran into the side of the house on the bicycle when K.O. let go. H.S. hit her head when she fell. K.O. testified that a day or two after the bicycle wreck, Appellant asked what had happened to H.S.'s ear. K.O. also testified that the burns on the victim's bottom were the result of K.O. and A.L. putting her in the bathtub when the water was too hot. The cigarette burns on the victim were inflicted by K.O., A.L., and Ms. Claiborne. K.O. testified that the injuries to the victim's eyes occurred when she and A.L. were swinging H.S. and H.S. hit a table with her face. She did not tell

Appellant because she was afraid that she would get into trouble. Ms. Claiborne was keeping K.O. out of school and having her shoplift. K.O. thought that it was a good situation.

K.O. also testified that they tried to hide the victim from Appellant. When the police officers came to arrest Appellant and Ms. Claiborne, K.O., A.L., and H.S. hid from the officers. Appellant was asleep when they left the house. After the officers left, K.O., A.L., and H.S. called Ms. Draughn. Ms. Smith came to pick them up. When they arrived at Ms. Draughn's house, A.L. took the victim to a bedroom and put her in the bed. They covered her up because they were afraid that someone would see H.S. Ms. Draughn knew there was something wrong with the victim. K.O. spoke with Appellant when he came to Ms. Draughn's house, but no one told him about the victim's injuries. When officers arrived later that night, K.O. and A.L. ran because they thought they would be in trouble because of the victim's injuries. K.O. saw Appellant driving down the road and got into the car. She told Appellant that the officers had taken the victim from Ms. Draughn's house. She did not tell Appellant that H.S. had gotten bee stings on her eyes. She told Appellant that the officers had taken H.S. because they thought she had been abused. Appellant was not around the house very much when the victim was injured. He was at work.

On cross-examination, K.O. testified that she spoke with Dr. Diana McCoy about five times in an effort to help her father at trial. When she first met with Dr. McCoy, K.O. told her the same things that she told DCS during her interviews with them, such as, K.O. would sneak H.S. to the bathroom, H.S. would never come out of her room, and someone told her to tell the authorities that H.S. had been stung by a bee. K.O. also told DCS that the children hid when the police came because they did not want to be taken away. She was afraid that they would be taken away because the victim's eyes were already matted shut when the officers came to arrest Appellant and Ms. Claiborne. K.O. was not sure how many days the victim's eyes had been matted shut. She had been with her mother the week before. K.O. returned on Sunday. H.S.'s eyes were not matted shut on Sunday but were on Monday. That same Monday, Appellant, Ms. Claiborne, K.O., A.L., and H.S. went to see about having A.L.'s tongue pierced. They all went in the car together. K.O. stayed in the car with H.S. because of the victim's injuries. According to K.O., Ms. Claiborne told her to stay in the car with H.S.

K.O. and the other children did not go to school the last two weeks of the school year. Ms. Claiborne decided they did not need to go. Appellant did not attempt to take K.O. to school during that time. With regard to the cigarette burns, K.O. testified that she, A.L., and Ms. Claiborne inflicted them. She said they burned the victim's arms and legs. However, when asked if the leg burns were above or below the knee, she replied that she was "not sure." She also could not tell counsel how many cigarette burns they inflicted. When testifying about the water burns from the bath, K.O. said that she and A.L. put H.S. in the water and gave her a bath. She said that the burns inflicted from the bath were to her back and one foot. K.O. repeated that H.S. hurt her eyes from K.O. and A.L. swinging her into the table. She stated that it occurred shortly before Appellant was arrested. With regard to the bicycle wreck, K.O. testified that H.S. rode a "three-wheeler." K.O. said that H.S. could not ride it by herself. K.O. then said that she was not sure if the bicycle was a three-wheeler or a two-wheeler. K.O. stated that H.S. ran into the back of the house. The victim's ear did

not sustain a cut, and it did not bleed. It began to swell and looked even bigger the next day. Appellant saw the ear and wanted to take her to the hospital. Ms. Claiborne told him that she had already taken H.S. to the hospital. K.O. stated that H.S. stayed in her room on Ms. Claiborne's instruction.

Dr. Diana McCoy is a clinical psychologist who evaluated Appellant. She testified as an expert witness on Appellant's behalf. To complete her evaluation of Appellant, Dr. McCoy received 4500 pages of records from the State, got his work records, and conducted interviews with Appellant and family members. She also received psychological evaluation records of A.L. After completing her evaluation, Dr. McCoy prepared a nineteen page report. She gave Appellant an I.Q. test and found him to be of average intelligence. She gave Appellant some additional psychological tests. Her conclusions as to Appellant's mental condition in May or June of the year in question are as follows:

> [Appellant] was experiencing a lot of stress in his relationship with Charlotte Claiborne and was being avoided in the household [by Ms. Claiborne, K.O. and A.L.], was staying away from home as much as he could, was having little contact with Charlotte and with the other – the two girls in the home because he felt himself to be ostracized and that they were angry with him.

The State presented one rebuttal witness, Michelle Norris. Ms. Norris was the foster mother with whom K.O. and H.S. stayed. K.O. lived with Ms. Norris while H.S. was in the hospital. Upon learning that H.S. was being released from the hospital, K.O. was happy. H.S. did not show any signs of being frightened of K.O. The two girls got along well.

The jury found Appellant guilty of three counts of aggravated child abuse and one count of aggravated child neglect. The trial court held a separate sentencing hearing on October 11, 2005. At the conclusion of the sentencing hearing, the trial court sentenced Appellant to twenty-five years for each aggravated child abuse conviction and twenty years for the aggravated child neglect conviction. The trial court ordered that all the sentences run consecutively which resulted in an effective sentence of ninety-five years.

Appellant filed a timely notice of appeal.

ANALYSIS

Motion for Judgment of Acquittal

Appellant's first issue on appeal is whether the trial court erred in denying his motions for a judgment of acquittal at the conclusion of the State's proof and at the conclusion of the proof entered at trial with regard to the three counts of aggravated child abuse. He makes no argument with regard to his conviction for child neglect. The State argues that the trial court properly denied

the motions.

According to Tennessee Rule of Criminal Procedure 29(b):

> On Appellant's motion on its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

This Court has noted that "[i]n dealing with a motion for judgment of acquittal, unlike a motion for a new trial, the trial judge is concerned only with the legal sufficiency of the evidence and not with the weight of the evidence." *State v. Hall*, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The standard for reviewing the denial or grant of a motion for judgment of acquittal is analogous to the standard employed when reviewing the sufficiency of the convicting evidence after a conviction has been imposed. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995).

The law of this state is that an appellant waives any error by a trial court in denying a motion for a judgment of acquittal at the conclusion of the State's proof if the appellant goes on to introduce evidence following the denial of his motion. *Finch v. State*, 226 S.W.3d 307, 316-18 (Tenn. 2007); *Mathis v. State*, 590 S.W.2d 449, 453 (Tenn. 1979). Therefore, Appellant has waived this issue with regard to the denial of his motion for judgment of acquittal at the conclusion of the State's proof.

We now analyze whether the evidence as presented at the trial as a whole is sufficient to support Appellant's convictions. When an appellant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the appellant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S .W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reevaluating the evidence when considering the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779.

Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

The jury convicted Appellant of three counts of aggravated child abuse and one count of aggravated child neglect. Appellant was indicted for aggravated child abuse and aggravated child neglect. The statute in effect at the time of the offenses stated, "[a] person commits the offense of aggravated child abuse or aggravated child neglect who commits the offense of child abuse or child neglect as defined in § 39-15-401 and: (1) The act of abuse or neglect results in serious bodily injury to the child . . . ." T.C.A. § 39-15-402(a)(1) (2003). At that time, Tennessee Code Annotated section 39-15-401 stated that child abuse and neglect occurs when "[a]ny person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare . . . ." T.C.A. § 39-15-401(a) (2003). "'Serious bodily injury' means bodily injury which involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty . . . ." T.C.A. § 39-11-106(34) (2003). "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." T.C.A. § 39-11-302(b).

Appellant argues that the State did not prove any connection between him and the incidents of abuse. The State argues that there is sufficient evidence to find Appellant guilty under the theory of criminal responsibility. "A person is criminally responsible as a party to an offense, if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both." T.C.A. § 39-11-401(a). Tennessee Code Annotated section 39-11-402(2) provides that an appellant is criminally responsible for the actions of another when, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, [the appellant] solicits, directs, aids, or attempts to aid another person to commit the offense . . . ." The appellant must "'in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.'" *State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting *Hembree v. State*, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)). The appellant's requisite criminal intent may be inferred from his "presence, companionship, and conduct before and after the offense." *State v. McBee*, 644 S.W.2d 425, 428 (Tenn. Crim. App. 1982). "An indictment that charges an accused on the principal offense 'carries with it all the nuances of the offense,' including criminal responsibility." *State v. Lemacks*, 996 S.W.2d 166, 173 (Tenn. 1999) (quoting *State v. Lequire*, 634 S.W.2d 608, 615 (Tenn. Crim. App. 1981)). An appellant convicted under a criminal responsibility theory "is guilty in the same degree as the principal who committed the crime" and "is considered to be a principal offender." *Id.* at 171. Criminal responsibility is not a separate crime; rather, it is "solely a theory by which the State may prove the Appellant's guilt of the alleged offense . . . based upon the conduct of another person." *Lemacks*, 996 S.W.2d at 170. Under a theory of criminal responsibility, an individual's "[p]resence and companionship with the perpetrator of a felony before and after the commission of [an] offense are circumstances from which [his or her]

participation in the crime may be inferred." *State v. Ball*, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998). No particular act need be shown, and the Appellant need not have taken a physical part in the crime in order to be held criminally responsible. *Id.* The trial court instructed the jury on two theories of criminal responsibility found at Tennessee Code Annotated section 39-11-402, which states:

> A person is criminally responsible for an offense committed by the conduct of another if:
>
> (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
>
> . . . .
>
> (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

T.C.A. § 39-11-402(1), (3).

In *State v. Hodges*, 7 S.W.3d 609 (Tenn. Crim. App. 1998), *perm. app. denied*, (Tenn. 1999), this Court held that a stepparent and caretaker has a "duty imposed by law" under Tennessee Code Annotated section 39-11-402(3) to protect a child from harm. 7 S.W.3d at 623. In *Hodges*, the appellant was married to the victim's mother, and the victim lived with them. This Court held that the evidence showed that the victim died as the result of blunt force trauma to the head and torso. *Id.* at 614. The question on appeal was whether the appellant or the victim's mother had inflicted the fatal blows. *Id.* We held that by being the victim's stepparent and the primary care giver the day of the victim's death the appellant had a duty imposed by law to care for the child and seek emergency treatment. *Id.* at 623. Therefore, we affirmed the appellant's conviction based upon the fact that he was criminally responsible for the conduct of the victim's mother. In a subsequent case, we stated, "it appears that the special relationship of parent and child or caretaker and child creates a legal duty to protect the child from harm, such that the parent or caretaker who breaches that duty is subject to criminal liability as set forth in section 39-11-402(3)." *State v. Larry E. Rathbone*, No. E2007-00602-CCA-R3-CD, 2008 WL 1744581, at *9 (Tenn. Crim. App., at Knoxville, Apr. 16, 2008), *perm. app. denied*, (Tenn. Oct. 27, 2008).

In the case at hand, Appellant had actively gone to court to seek custody of H.S. from her mother. He was successful and gained full custody of H.S. in December of 2003. Under the case law in this State, there can be no dispute that there was a duty imposed upon Appellant, as the

victim's father who had sole custody at the time, to care for H.S. and prevent harm to her, as well as seek medical attention when harm occurred.

We have established that Appellant had a duty imposed by law to prevent harm to the victim. We must now analyze whether, when considered in the light most favorable to the State, a reasonable person could find that the evidence supported convictions for aggravated child abuse. The State indicted Appellant for the three counts of aggravated child abuse based upon injuries to: the victim's nose, the victim's ear, and the victim's eyes. The doctors testified that the injuries sustained would have been very painful, resulted in obvious and protracted disfigurement, and, potentially, would have resulted in the loss or impairment of the organs in question. There is no question that these three injuries constitute serious bodily injury as defined in Tennessee Code Annotated section 39-11-106(34) (2003).

With respect to the injuries to H.S.'s nose, the evidence shows that Appellant was aware of the injuries in question. Ms. Mattie testified that she saw the victim in the backseat of a car with Ms. Claiborne and Appellant. She saw that the victim's nose was bleeding into her mouth and that her eyes were turning blue. She was so alarmed by the victim's condition that she telephoned the authorities. Dr. Campbell testified that the injury to the victim's nose was caused by blunt force trauma. She also testified to a time frame that was consistent with the time when Ms. Mattie would have seen the child with Appellant and Ms. Claiborne. Dr. Campbell also stated that this injury would have caused extreme physical pain and protracted disfigurement.

However, under the indictments and the timeline presented by the State at the trial, this injury was the first injury known by Appellant. To be convicted through a theory of criminal responsibility, Appellant must have known that Ms. Claiborne was inflicting the injuries in question. There was no evidence presented by the State to demonstrate that Appellant was aware of the injuries before Ms. Mattie saw H.S. in the car with Appellant and Ms. Clairborne. Therefore, we cannot hold the Appellant "act[ed] with the culpability required" or "act[ed] with intent" to injure H.S. For this reason, the evidence cannot support Appellant's conviction for aggravated child abuse with regard to H.S.'s broken nose.

Regarding the victim's ear, Appellant himself testified that he noticed the condition of the victim's ear on more than one occasion, but he made no efforts to seek treatment. Dr. Campbell testified that the injury was the result of blunt force trauma. She also testified that the blood clot caused as a result of the injury would have formed quickly and been readily apparent. Dr. Campbell also stated that had the ear been drained, the cauliflower deformity could have been avoided.

The injuries to the victim's eyes were estimated to have occurred "more than a couple of days" before she was brought to the hospital. When Ms. Smith and Ms. Bohrer saw the victim's eyes, they immediately became concerned and urged Ms. Draughn to take the victim to the hospital. There was testimony that Appellant was at his house when H.S. was there and was also at Ms. Draughn's house. In addition, K.O. testified that the victim's eyes were matted shut on the day that the family went to see about A.L. getting her tongue pierced. K.O. testified that Appellant was in

the car with H.S. in the backseat. Dr. Gitschlag opined that the injuries were caused by some type of chemical sprayed into the victim's eyes. He also testified that the injury would have been particularly painful because the cornea was one of the two areas of the body with the highest concentration of nerves.

It is clear that a reasonable trier of fact could conclude from the testimony at the trial that Appellant was aware of the injuries to the victim's ear and eyes. There was testimony that Appellant was present when other people, some of whom were not even connected with the family, saw the injuries and were very alarmed at their severity. It is reasonable to conclude that a child's father would have noticed injuries that were severe enough to rouse suspicion in strangers. It is also indisputable that the injuries caused serious bodily injury to H.S. As stated above, although there is no evidence that Appellant himself inflicted any of the injuries, a reasonable trier of fact could find him guilty through the theory of criminal responsibility because he had sole custody of H.S. and, therefore, had a duty to prevent harm to her and to seek medical treatment when harm occurred.

For this reason, we conclude that there is sufficient evidence to support Appellant's convictions of aggravated child abuse with regard to the injuries to the victim's ear and eyes. However, the conviction based upon the injury to H.S.'s nose must be reversed and dismissed.

State's Failure to Provide Allegedly Exculpatory Evidence

As part of the discovery process, Appellant's attorney filed a motion requesting that any taped interviews of the children in this case be provided to the defense. When informed that the tapes of interviews with the children could not be found, Appellant's attorney filed a motion to dismiss based on the State's failure to provide him with allegedly exculpatory evidence. The trial court conducted a hearing on the motion to dismiss on April 29, 2005.

At the hearing on the motion to dismiss, a DCS case worker testified that she had interviewed the children and had tape recorded the interviews. She also stated that she later typed an account of the interviews including the questions and answers. She used both the tapes and handwritten notes made during the interviews to type the account. The accounts were not verbatim representations of the interviews but rather summaries with notations about the interviewee's demeanor and reactions. The DCS caseworker testified that she took the original tapes to the Sheriff's Office the week of October 11, 2004. She gave them in a manila envelope to Detective Amy Hammac. She also stated that the handwritten notes and the typed dictation were delivered to the District Attorney's office. Detective Amy Hammac also testified at the hearing. She denied ever receiving any tapes from the DCS caseworker. Detective Hammac stated that after the motions were filed regarding the tapes, she helped the assistant district attorney search the sheriff's department for the tapes and found nothing.

The trial court denied the motion to dismiss. The court noted that the children were available and could be called to testify at trial.

On appeal, Appellant argues that the taped interviews are favorable to him because the children "asserted that Appellant had done nothing wrong" when they were interviewed. He also argues that because of this fact, there is a reasonable probability that the results would have been different. He argues that "there is no direct proof that Appellant committed any abuse on the alleged victim."

Both parties in this appeal frame the failure of the prosecution to provide these tapes as an issue involving the suppression of allegedly exculpatory evidence, which is a due process of law violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). However, because the tapes do not appear to have been deliberately suppressed, but were inadvertently lost, the issue is more properly analyzed under the Tennessee Supreme Court case of *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999).

In *Ferguson*, the Court developed an analysis to determine whether the loss of evidence in the hands of the prosecution rendered a trial conducted without the evidence "fundamentally unfair" so as to require a dismissal of the case against the defendant. *Id*. at 914. The Court stated:

> The first step in this analysis is to determine whether the State had a duty to preserve the evidence. Generally speaking, the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law. It is, however, difficult to define the boundaries of the State's duty to preserve evidence. This difficulty is recognized in *California v. Trombetta*, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2533-34, 81 L.Ed.2d 413 (1984). It held:
>
> > Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.
>
> If the proof demonstrates the existence of a duty to preserve and further shows that the State has failed in that duty, the analysis moves to a consideration of several factors which should guide the decision regarding the consequences of the breach. Those factors include:
>
> > 1. The degree of negligence involved;
> >
> > 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and

> 3. The sufficiency of the other evidence used at trial to support the conviction.
>
> Of course, as previously stated, the central objective is to protect the defendant's right to a fundamentally fair trial. If, after considering all the factors, the trial judge concludes that a trial without the missing evidence would not be fundamentally fair, then the trial court may dismiss the charges. Dismissal is, however, but one of the trial judge's options. The trial judge may craft such orders as may be appropriate to protect the defendant's fair trial rights. As an example, the trial judge may determine, under the facts and circumstances of the case, that the defendant's rights would best be protected by a jury instruction.

Id. at 917 (footnotes omitted).

In the instant case, it is debatable whether the prosecution was under a duty to preserve the tapes in question. From the record, it is impossible to determine the degree of negligence involved in the loss of the tapes. Appellant maintains that the tapes were exculpatory and crucial to his defense because the children maintained that Appellant never physically abused H.S. However, K.O., another daughter of the Appellant, testified at trial that her father never abused H.S. Thus, Appellant was able to put this proof before the jury. Moreover, although A.L., another of the children interviewed by the caseworker, was available to testify, the defense elected not to call her to the stand. It also appears that Appellant was provided with the DCS caseworker's notes concerning the interviews. Finally, it should be noted that information that Appellant did not physically abuse H.S. would not have undermined the State's theory of prosecution that Appellant was guilty because he was criminally responsible for the abuse of H.S. at the hands of Ms. Claiborne and the other children.

Under the circumstances, we conclude that the loss of the taped interviews did not render Appellant's trial "fundamentally unfair." He is not entitled to relief with respect to this issue.

The trial court conducted a jury-out hearing concerning the proposed testimony of the Assistant District Attorney. Appellant's counsel was able to examine the Assistant District Attorney out of the hearing of the jury. During this examination, Appellant's counsel stated that the information they wanted to get in at trial was the fact that the Assistant District Attorney denied A.L.'s request for immunity before conducting the taped interview. At the conclusion of the jury-out hearing, the trial court denied Appellant's request to call the Assistant District Attorney as a witness.

A trial court may in its discretion allow a prosecuting attorney to testify when necessary. *State v. Caruthers*, 676 S.W.2d 935, 940 (Tenn. 1984); *Bowman v. State*, 598 S.W.2d 809, 811 (Tenn. Crim. App. 1980). Our supreme court has held that a trial court properly denied an appellant's calling of an assistant district attorney because his testimony would have been cumulative and unnecessary. *Caruthers*, 676 S.W.2d at 940.

At trial, Appellant called the attorney ad litem for A.L. On direct examination, counsel for Appellant asked the attorney ad litem if he had asked for immunity for A.L. The attorney ad litem stated that he had requested immunity. For reasons unclear to this Court, counsel for Appellant did not ask the attorney ad litem if the State denied his request. We have found no restriction upon Appellant regarding questioning the attorney ad litem on this matter. The fact that Appellant chose not to seek this information through the attorney ad litem cannot be remedied by an attack on the trial court's denial of his request. We conclude no abuse of discretion in the trial court's denial of Appellant's request.

In addition, we point out that Appellant once again argues that this information was pertinent because A.L.'s request for immunity and the subsequent denial implied that she was the perpetrator. As we have stated above, the State was not required to prove that Appellant physically injured the victim, only that he was criminally responsible for the actions of others in the household.

Therefore, this issue is without merit.

Trial Court's Refusal to Require the District Attorney's Office to Recuse Itself as Prosecutor

Appellant also argues that the trial court erred in refusing to grant his request that the District Attorney's Office recuse itself as prosecutor. Appellant bases this argument on the fact that the Assistant District Attorney was a witness to the taped interview of A.L. and that she refused A.L.'s request for immunity.

We initially point out that Appellant has cited no authority to support this argument. Rule 27(a)(7) of the Tennessee Rules of Appellate Procedure provides that a brief shall contain "[an] argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on." Tennessee Court of Criminal Appeals Rule 10(b) states that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." *See also State v. Sanders*, 842 S.W.2d 257 (Tenn. Crim. App. 1992) (determining that issue was waived where the appellant cited no authority to support his complaint).

Nonetheless, we have chosen to address this issue on the merits. "The focus on whether a district attorney or any assistants within the office should be disqualified often depends upon the value of their potential testimony." *State v. Baker*, 931 S.W.2d 232, 237 (Tenn. Crim. App. 1996). We have already determined that the trial court did not err in denying Appellant's request to call the Assistant District Attorney as a witness because of the cumulative nature of her testimony.

Therefore, this issue is without merit.

Trial Court's Failure to Assist Appellant with Access to Witness

At the hearing concerning the missing interview tapes, the trial court, in an effort to recreate the substance of the missing tapes, told the State to make a list of everyone who was privy to the interviews that were recorded. Appellant made several attempts to interview A.L. One of these attempts included an interview to be conducted by Appellant's expert witness, Dr. McCoy. A.L. refused to be interviewed. A.L.'s counsel informed the trial court that A.L. would only be available under the order of the trial court. The trial court refused to order A.L. to submit to the interviews. Appellant argues on appeal that this was error on the part of the trial court.

Once again, Appellant has failed to cite to authority to support his argument. In *State v. Singleton*, 853 S.W.2d 490 (Tenn. 1993), our supreme court addressed the issue of the Appellant's access to witnesses before trial. Our supreme court stated:

> Tennessee case law, moreover, gives a prospective witness the discretion to talk–or not to talk–to either counsel, as the witness sees fit. Of course, the law also provides that counsel may not instruct a witness not to discuss the facts of a case with opposing counsel. In *Gammon v. State*, 506 S.W.2d 188, 190 (Tenn. Crim. App. 1974), the Court of Criminal Appeals restated the well-recognized principle that
>
> > [p]rospective witnesses are not partisans, and they should be regarded as spokesmen for the facts as they see them. Because they do not 'belong' to either party, a prosecutor, defense counsel or anyone acting for either should not suggest to a witness that he not submit to an interview by opposing counsel.
>
> In this case, the Appellant does not allege that the state violated *Gammon* by instructing the officers not to speak to defense counsel. As long as *Gammon* is not violated,
>
> > [a] defendant is entitled to have access to any prospective witness although such right of access may not lead to an actual interview. * * * [A]ny witness has the right to refuse to be interviewed, if he so desires (and is not under or subject to legal process). * * * The importance of the rights of access is somewhat tempered by the witness'[s] equally strong right to refuse to say anything.

Singleton, 853 S.W.2d at 493.

As stated above, any witness has the right to refuse to be interviewed. Appellant, the

attorneys who were representing the adults and children connected with the incidents, and the State all stated at some point on the record that A.L. refused to be interviewed. This was her right, and the trial court did not err in refusing to order her to be interviewed.

Therefore, this issue is without merit.

Introduction of Photographs

Appellant argues that the trial court erred in allowing photographs depicting the victim's injuries into evidence because their prejudicial effect outweighed their probative value. The State argues that the trial court did not err.

As we begin our analysis, we note well-established precedent providing "that trial courts have broad discretion in determining the admissibility of evidence, and their rulings will not be reversed absent an abuse of that discretion." *State v. McLeod*, 937 S.W.2d 867, 871 (Tenn. 1996). To be admissible, evidence must satisfy the threshold determination of relevancy mandated by Rule 401 of the Tennessee Rules of Evidence. *See, e.g.*, *Banks*, 564 S.W.2d at 949. Rule 401 defines "relevant evidence" as being "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant "evidence may be excluded if its probative value is substantially outweighed by . . . the danger of unfair prejudice." Tenn. R. Evid. 403; *see also Banks*, 564 S.W.2d at 951.

Graphic, gruesome, or even horrifying photographs of crime victims may be admitted into evidence if they are relevant to some issues at trial and their probative value is not outweighed by their prejudicial effect. *Banks*, 564 S.W.2d at 949-51. On the other hand, "if they are not relevant to prove some part of the prosecution's case, they may not be admitted solely to inflame the jury and prejudice them against the Appellant." *Id.* at 951 (citing *Milam v. Commonwealth*, 275 S.W.2d 921 (Ky. 1955)). The decision as to whether such photographs should be admitted is entrusted to the trial court, and that decision will not be reversed on appeal absent a showing of abuse of discretion. *Id.* at 949; *State v. Dickerson*, 885 S.W.2d 90, 92 (Tenn. Crim. App. 1993).

The term "undue prejudice" has been defined as "[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Banks*, 564 S.W.2d at 950-51. In *Banks*, the Supreme Court gave the trial courts guidance for determining the admissibility of relevant photographic evidence and determined that a trial court should consider: (1) the accuracy and clarity of the picture and its value as evidence; (2) whether the picture depicts the body as it was found; (3) the adequacy of testimonial evidence in relating the facts to the jury; and (4) the need for the evidence to establish a prima facie case of guilt or to rebut the Appellant's contentions.

Id. at 951.

The trial court held a pre-trial hearing to determine the admissibility of the photographs. The attorney for Appellant, the district attorney's office, and the trial court went through all the photographs proposed for admission into evidence. Appellant's counsel and the other defense counsel lodged their objections to the photographs, and the trial court ruled on each photograph individually. The trial court excluded several photographs. The remaining photographs were introduced at trial.

We conclude that the probative value of the photographs in question was not substantially outweighed by prejudicial effect. Introduction of the photographs was relevant to show extent of injuries and the fact that Appellant could not have ignored the nature and the seriousness of the injuries without being criminally responsible for the aggravated child abuse and aggravated child neglect. A witness's or doctor's description of the injuries would not have been sufficient. We hold that the trial court did not abuse its discretion in admitting the photographs.

Therefore, this issue is without merit.

Expert Witness

Appellant retained the services of Dr. Diana McCoy, a clinical forensic psychologist, to evaluate Appellant's mental state during the time the offenses occurred. The State objected to Dr. McCoy's testimony concerning collateral information she obtained through interviews gathered from other children living with Appellant and his girlfriend at the time. The trial court sustained this objection and restricted Dr. McCoy's testimony with regard to this information. On appeal, Appellant argues that the trial court erred in sustaining the State's objection to Dr. Diana McCoy's testimony resulting in a restriction on her testimony and the exclusion of her report. The State argues on appeal that its objection only restricted Dr. McCoy from testifying about statements made to her by other children in the household and that Dr. McCoy was allowed to testify fully as to her opinion of Appellant's mental state.

Rule 702 of the Tennessee Rules of Evidence governs the admissibility of expert testimony. It provides:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 702.

Rule 703 of the Tennessee Rule of Evidence provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

In *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997), our supreme court addressed the admissibility of scientific evidence under Tennessee Rules of Evidence 702 and 703. Citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2796 (1993), the court held that evidence and expert testimony regarding scientific theory must be both relevant and reliable before it can be admitted. *McDaniel*, 955 S.W.2d at 265. The court also listed several nonexclusive factors that trial courts may consider when determining the reliability of scientific expert testimony, including:

> (1) whether the scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.

Id.

Determinations regarding the admissibility of expert testimony are left to the sound discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). On appeal, our standard of review is whether the trial court abused its discretion by not allowing the expert testimony. Before reversing the trial court's determination, we must determine that the record shows that the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999); *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997).

Rule 703 of the Tennessee Rules of Evidence contemplates three possible sources from which an expert may base his/her opinion: (1) information actually perceived by the expert; (2) information made known to the expert by others; and (3) information reasonably relied upon by experts in the particular field. *See* Tenn. R. Evid. 703; *see also* Neil P. Cohen, *et. al.*, Tennessee Law of Evidence §§ 7.03(3), 7.03(4), 7.03(5) (5th ed. 2005). In other words, Rule 703 contemplates that inherently reliable information is admissible to show the basis for an expert's opinion, even if the information would otherwise constitute inadmissible hearsay. *See* Tenn. R. Evid. 703. It is not uncommon for an expert witness's opinion to be based on facts or data that are not admissible into evidence but are reliable. *See* Neil P. Cohen *et al.*, Tennessee Law of Evidence § 7.03(4).

At trial, Appellant presented Dr. McCoy as an expert witness in forensic psychology. She

was allowed to testify regarding her conclusions following a psychological evaluation of Appellant. This evaluation included interviews and psychological testing of Appellant. She also interviewed K.O., R.M., Ms. Claiborne's son, and Appellant's ex-wife. In addition, Dr. McCoy relied upon various documents including police reports, writings of Ms. Claiborne's, and psychological records of A.L. when completing her evaluation. Dr. McCoy was allowed to testify without objection to her findings and conclusions with regard to Appellant. However, when Dr. McCoy began to testify as to what K.O. told her during their time together, the State objected. The State based its objection upon the argument that it was hearsay. Appellant argued that an expert witness could base his or her opinion upon hearsay. The trial court stated that Dr. McCoy could not testify as to what she heard from someone else. The trial court requested that Appellant frame the questions in such a manner that Dr. McCoy would not testify as to what K.O. told her during their interview, but instead as to her conclusion drawn following the interview. Appellant did not make a proffer as to what Dr. McCoy would have testified with regard to the individuals she interviewed. At the conclusion of her testimony, the trial court would not allow into evidence Dr. McCoy's report of her findings because it included a great deal of information that was outside the scope of her testimony.

We begin our analysis by noting that Appellant made no offer of proof as to what Dr. McCoy's testimony would have been with regard to K.O. or other individuals whom she interviewed. When an appellant bases an appeal on the exclusion of testimony, an offer of proof must be made so that the appellate court may make a proper determination as to whether the exclusion of the evidence was reversible error. *State v. Goad*, 707 S.W.2d 846, 852-52 (Tenn. 1986). This Court has stated that when an expert witness's testimony is excluded, such an offer of proof is required of the expert's testimony. *State v. Robinson*, 73 S.W.3d 136, 150-51 (Tenn. Crim. App. 2001). Because there was no offer of proof with regard to Dr. McCoy's testimony, "we cannot speculate as to [her] proposed testimony or its purpose." *Id.* at 151. Therefore, we are unable to address Appellant's issue with regard to Dr. McCoy's testimony.

We now turn to the application of Rule 703 in the exclusion of Dr. McCoy's report, which was marked as an exhibit for identification and is included in the record. As stated above, under Rule 703, an expert may base his or her opinion on types of information that are reasonably relied upon by experts in a particular field. In *State v. Lisa Durbin Howard*, No. E2007-00178-CCA-R3-PC, 2008 WL 1805758 (Tenn. Crim. App., at Knoxville, Apr. 22, 2008), *perm. to app. denied*, (Tenn. Oct. 27, 2008), a jury found the appellant guilty of first degree premeditated murder. 2008 WL 1805758, at *1. During the trial, the appellant attempted to offer expert testimony of a clinical psychologist, Dr. David Solovey, who evaluated the appellant. *Id.* at *9. Dr. Solovey began to testify as to his evaluation of the appellant and stated that his evaluation included interviews of the Appellant's relatives. *Id.* at *10. The trial court sustained the objection. *Id.* at *11. On appeal, this court addressed whether the underlying facts and data relied upon by Dr. Solovey were mistakenly excluded as evidence. We stated that "[m]ental health experts commonly rely on such statements, many of which would not be admissible as evidence at trial because of hearsay or other evidentiary restrictions." *Id.* at *13. This Court went on to conclude that the trial court's exclusion of the evidence "based on hearsay concerns was error." *Id.*

It is clear that in the case at hand, the information gathered in interviews with K.O. and others constitutes information commonly relied upon by experts, such as Dr. McCoy. *See id.* at *12-13. Our supreme court recently stated, "Where the expert's testimony is otherwise reliable and experts in the field would reasonably rely upon such evidence, concerns are more properly addressed through vigorous cross-examination rather than exclusion of the testimony." *State v. Scott*, 275 S.W.3d 395, 409 (Tenn. 2009). Rule 703 states that a trial court may exclude such testimony if the underlying information is unreliable. Following the State's objection, the trial court should have determined whether the interviews of K.O. and the other individuals were untrustworthy. If the trial court found Dr. McCoy's interview of K.O., or any other interviewee, to be untrustworthy, the trial court could have then excluded that evidence. We conclude that the trial court erred when it excluded Dr. McCoy's report based upon the fact that it was outside the scope of her testimony when the trial court erred in restricting Dr. McCoy's testimony based upon the evidence violating the hearsay rules.

However, our analysis does not end there. If we determine that the exclusion of Dr. McCoy's report was harmless, then Appellant's conviction need not be overturned. *See State v. Ferrell*, 277 S.W.3d 372, 380 (Tenn. 2009). Our supreme court recently clarified Tennessee appellate courts' analysis with regard to harmless error:

> Tennessee's harmless error doctrine, reflected in Tenn. R. App. P. 36(b), rests on a foundation that recognizes that a person accused of a crime is entitled to an essentially fair trial and that a person convicted of a crime as a result of an essentially fair trial is not entitled to have his or her conviction reversed based on errors that, more probably than not, did not affect the verdict or judgment. When the appellate courts conduct a harmless error analysis using Tenn. R. App. P. 36(b), they must be careful to avoid becoming a second jury by conflating the harmlessness inquiry with their own assessment of the Appellant's guilt. The analysis is more than simply a calculation of whether sufficient evidence exists to support the conviction. It requires a careful examination of the entire record to determine whether the non-constitutional error involving a substantial right "more probably than not affected the judgment or would result in prejudice to the judicial process." *See State v. Toliver*, 117 S.W.3d [216,] 231 [(Tenn. 2003)] (finding an error to be harmful even though the evidence was legally sufficient to affirm the convictions); *see also State v. Denton*, 149 S.W.3d [1,] 15-17 [(Tenn. 2004)]; *Blankenship v. State*, 219 Tenn. 355, 360, 410 S.W.2d 159, 161 (1966); *Peek v. State*, 21 Tenn. (2 Hum.) [78,] 88 [(1840)].

State v. Rodriguez, 254 S.W.3d 361, 373-74 (Tenn. 2009) (footnotes omitted).

In this case, Dr. McCoy was allowed to fully testify as to her conclusions regarding Appellant's mental state. The only restriction on her testimony applied to specific information supplied to her in her interviews of individuals other than Appellant. Dr. McCoy was not restricted

as to her conclusion that Appellant was experiencing a great deal of stress and was avoiding the house. Dr. McCoy was allowed to testify as to most of the content of her report. Her report included information provided in interviews with K.O., R.M., Annette Owens, Donnie Owens, and Renae Bond, Appellant's ex-wife. As stated above, K.O. testified extensively at trial on behalf of Appellant. During her testimony, she testified as to the conditions of the home and the extent to which Appellant was aware of the care of the victim. K.O. also testified on cross-examination regarding her interview with Dr. McCoy and the information she gave Dr. McCoy. Therefore, the jury was allowed to hear similar evidence by another of Appellant's witnesses about K.O.'s interview with Dr. McCoy and the situation in the household. Mr. and Mrs. Owens also testified at trial on Appellant's behalf. Their statements to Dr. McCoy regarding Appellant's behavior and home situation were substantially similar to their testimony at trial. R.M. did not testify at trial. However, his statements to Dr. McCoy would not have been helpful to Appellant. According to Dr. McCoy, he changed his story and obviously was attempting to protect his mother, Ms. Claiborne. Ms. Bond did not testify at trial. Her statements to Dr. McCoy concerned K.O.'s remoteness and a change in the relationship between Appellant and K.O.

The information in the report was either testified to at trial by Dr. McCoy or the interviewees in question, K.O., Mr. Owens, and Mrs. Owens, or was not relevant to the issue as to whether Appellant was cognizant of the injuries being inflicted on H.S. After reviewing the record in its entirety, we conclude that the verdict was not affected by the trial court's exclusion of the underlying evidence of Dr. McCoy's interviews with third parties. Therefore, the trial court's error in excluding Dr. McCoy's report as evidence is harmless.

Sentencing

Appellant also argues that the trial court erred in imposing his sentences. Appellant's argument focuses on the trial court's imposition of consecutive sentences. Appellant's argument with regard to length of the sentence consists of the following, "Further, Appellant asks this court to review the sentence length with a view toward reducing its length, or remand the case to the trial court for resentencing." The State argues that the trial court did not err in sentencing Appellant.

In response to the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 125 S. Ct. 738 (2004), the Tennessee Legislature amended Tennessee Code Annotated section 40-35-210 so that Class A felonies would now have a presumptive sentence beginning at the minimum of the sentencing range. *Compare* T.C.A. § 40-35-210(c) (2003) *with* T.C.A. § 40-35-210(c) (2006).[3] In addition, the amended statute stated that the trial court was not bound by the sentencing guidelines concerning the minimum sentence within a range and the application of

[3] The 2005 amendments have been cited with approval by the United States Supreme Court. *Cunningham v. California*, 549 U.S. 270, 294, 127 S. Ct. 856, 871 n.18 (2007) In *Cunningham v. California*, the Supreme Court revisited issues addressed in the *Blakely* line of cases. The Supreme Court stated, with approval, that "[o]ther States have chosen to permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which 'everyone agrees,' encounters no Sixth Amendment shoal." *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 233 125 S. Ct. 738, 750 (2005)).

enhancement and mitigating factors to increase the sentence above the minimum and that the guidelines were advisory. *Id.* This amendment became effective on June 7, 2005. The legislature also provided that this amendment would apply to appellants who committed a criminal offense on or after June 7, 2005. Tenn. Pub. Acts 2005, ch. 353, § 18. In addition, if an appellant committed a criminal offense on or after July 1, 1982, and was sentenced after June 7, 2005, such appellant can elect to be sentenced under these provisions by executing a waiver of their *ex post facto* protections. *Id.* In the case *sub judice*, Appellant signed such a waiver; therefore, the amendments apply in our review of his sentencing.

"When reviewing sentencing issues . . . , the appellate court shall conduct a *de novo* review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991)). We are also to recognize that the Appellant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, first determines the range of sentence and then determines the specific sentence and the appropriate combination of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts regarding sentences for similar offenses, (7) any statements the Appellant wishes to make in the Appellant's behalf about sentencing; and (8) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -103(5); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

When imposing the sentence within the appropriate sentencing range for the Appellant:

> [T]he court shall consider, but is not bound by, the following *advisory* sentencing guidelines:
> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
>
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210(c) (2006) (emphasis added). However, the weight given by the trial court to the mitigating and enhancement factors are left to the trial court's discretion and are not a basis for reversal by an appellate court of an imposed sentence. *Carter*, 254 S.W.3d at 345. "An appellate court is . . . bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

We initially point out that Appellant has failed to present an argument or cite authority with regard to his plea to reduce the length of his sentences within the range. *See* Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b); *see also Sanders*, 842 S.W.2d at 259 (determining that issue was waived where Appellant cited no authority to support his complaint). Appellant fails to cite any authority for his claim. Therefore, his challenge to the length of his sentence within the range is waived.

Consecutive Sentencing

Appellant argues that the trial court erred in relying upon Tennessee Code Annotated section 40-35-115(b)(4) to impose consecutive sentences. Under Tennessee Code Annotated section 40-35-115(a), if an Appellant is convicted of more than one offense, the trial court shall order the sentences to run either consecutively or concurrently. A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that:

> (1) The defendant or [Appellant] is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the Appellant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; . . . .

T.C.A. § 40-35-115(b)(1)-(4). Tennessee Code Annotated section 40-35-115(b)(4) permits the trial court to impose consecutive sentences if the court finds that "the defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a

crime in which the risk to human life is high." T.C.A. § 40-35-115(b)(4). However, before ordering the appellant to serve consecutive sentences on the basis that he is a dangerous offender, the trial court must find that the resulting sentence is reasonably related to the severity of the crimes, necessary to protect the public against further criminal conduct, and in accord with the general sentencing principles. *See State v. Imfeld*, 70 S.W.3d 698, 708-09 (Tenn. 2002); *State v. Wilkerson*, 905 S.W.2d 933, 938-39 (Tenn. 1995).

The trial court based its imposition of consecutive sentencing on specific findings that Appellant committed a crime where the risk to human life was high. The trial court also found that the circumstances surrounding the offense were particularly aggravated because the injuries for which Appellant is criminally responsible were inflicted from April to the middle of June, a period of two and a half months. The trial court determined that the length of the sentences was reasonably related to the offenses because Appellant was convicted of four Class A felonies. The trial court also cited the fact that the victim was of such a young age, as well as the enormity of the injuries. The trial court also stated that it was disturbed by the fact that K.O. took responsibility for the actions of the adults in the household and the abuse of H.S. The trial court also cited to the fact that Appellant actively sought to gain custody of H.S. In conclusion, the trial court stated the following:

> It's been an utter lack of acknowledgment that you, [Appellant], the blood father, had the – that you had the responsibility to protect the child. During testimony at the trial, you said that these people were bathing the child, that these – was these people['s] responsibility, you just worked. That's not what a father does. A father brings a child on the planet and you have a responsibility to see to the day-to-day activities of this child, and you have completely, completely thrown the paternal instinct into the water.
>
> The lack of protection by you is shown as utterly and morally reprehensible, and it's every bit as reprehensible as it is unlawful. These acts defy any basic paternal instincts shown by the least of fathers . . . . You abused the justice system to gain custody, you exploited the public by engaging in criminal activity to support an addiction, and you willfully chose not to father your child to the point that she very nearly lost her life.

We agree with the trial court that the offenses in question are appalling. However, as the law in this State stands today, these facts do not support the imposition of consecutive sentences.[4] The

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[4] The General Assembly of Tennessee has provided that a defendant who is convicted of more than one offense involving sexual abuse of a minor, after taking into account the relationship between the defendant and the victim and the length of time of the abuse, may be sentenced to consecutive sentences. T.C.A. § 40-35-115(b)(5). However, our legislatuare body has not extended this provision to multiple convictions for aggravated child abuse and aggravated child neglect.

facts in question cannot meet the requirements set out in *Wilkerson* to show that Appellant is a dangerous offender. While we agree that the imposition of consecutive sentences is reasonably related to these offenses, we conclude that Appellant has scant prior history. His presentence report lists convictions for allowing dogs to run at large, driving under the influence, and assault. With regard to these convictions, Appellant has served only forty-eight hours for the DUI, and the remainder of his sentences have been suspended. In connection with the assault conviction, he was also ordered to have no contact with the victim's mother. It appears that Appellant is more of a danger to his own family than to the general public. There is no support in this record for the proposition that consecutive sentences are warranted to protect the public. Therefore, we must modify Appellant's sentences to run concurrently with each other, instead of consecutively.

Right to a Public Trial

Appellant argues that the trial court erred by denying him a public trial as guaranteed by both the Federal and state constitutions. The State argues that the trial court neither completely nor partially closed the courtroom; therefore, Appellant was not denied a public trial.

On the morning of June 29, 2005, the trial court made the following announcement during the trial:

> I have an announcement to make concerning Courtroom decorum. Everything is going fairly well. However, due to the sensitive nature of this trial, what I'm gonna do is have the Court officers allow – first of all, we're gonna announce that we are in session, that will be fine. If you leave prior to the break, you will not be readmitted. Please understand why we're doing that. It's for security reasons and also, it is something of a distraction for everyone involved when we have entry and exit going on – going on and about.
>
> We're also going to close this door off. There will be no entry into the room on this side door while Court is in session prior to breaks. Does everyone understand the Court's announcement? That if you are in, you're certainly welcome to stay in throughout the entire proceedings until our break, which will be somewhere in the neighborhood of 10:15, 10:30, but if you leave during session, you will not be readmitted.

Subsequently, the trial court clarified its ruling:

> Let me make sure everyone inside [sic] the Court's ruling concerning entry and then reentry in the Courtroom. I want to make sure the Court officers are listening. This Court cannot prohibit anyone from entering this Courtroom while

> Court is in session. Therefore, once you make entry, and in fact, the public and whomever is interested in this trial may certainly enter. Once you have entered, then you're, of course, welcome to stay. If you leave after you've been [sic] entered the first time, you cannot reenter. I want to make sure that the Court officers understand that. I think we've had some people that have tried to come in while Court is in session and not been permitted to come in. That's not the Court's ruling. They can come in and they can leave, but once they have come in and left, they cannot come back.

The Sixth Amendment of the United States Constitution guarantees an appellant the right to a "public trial." *See In re Oliver*, 333 U.S. 257, 68 S. Ct. 499 (1948); *State v. Schiefelbien*, 230 S.W.3d 88, 114 (Tenn. Crim. App. 2007). The right to a public trial is "a shared right of the accused and the public, the common concern being the assurance of fairness." *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 7, 106 S. Ct. 2735, 2739 (1986). "Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Smith v. Doe*, 538 U.S. 84, 99, 123 S. Ct. 1140, 1150 (2003). However, this right is not absolute and "must yield to other rights or interests." *Schiefelbein*, 230 S.W.3d at 114.

In *State v. Sams*, 802 S.W.2d 635 (Tenn. Crim. App. 1990), this Court stated the following with regard to closures of the courtroom:

> A complete closure has the effect of excluding everyone from the courtroom with the exception of the parties, the attorneys, court personnel, and the witnesses. A complete closure may be for the entire trial or proceeding, or a portion of the proceedings, such as the testimony of a particular witness. A partial closure results in the exclusion of certain members of the public while other members of the public are permitted to remain in the courtroom.

Sams, 802 S.W.2d at 639-40 (footnotes omitted).

The trial court's order did not have the effect of either a complete closure or a partial closure. The trial court's announcement did not exclude any individuals from the courtroom. Rather, if an individual left during the proceedings, he or she would not be allowed back in until the next break. Based upon the definition of closure in *Sams*, we conclude that there was no closure in the courtroom. In addition, Appellant has cited no authority to show that such an order would constitute a closure of the courtroom.

Even if we were to conclude that there was a closure, Appellant made no objection during the proceedings to the trial court's announcement. Appellant's failure to object waives "his right to a public trial to the extent that what occurred can even be characterized as a 'closure.'" *Schiefelbein*,

230 S.W.3d at 88 (citing *State v. Tizard*, 897 S.W.2d 732 (Tenn. Crim. App. 1994)).

Therefore, this issue is without merit.

CONCLUSION

We reverse Appellant's conviction for aggravated child abuse with regard to the injury to H.S.'s nose. We affirm the other two aggravated child abuse convictions. In addition, we conclude that Appellant's sentences must run concurrently, rather than consecutively. Therefore, we reverse in part, modify in part, and remand to the trial court for further proceedings in accordance with this opinion.

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JERRY L. SMITH, JUDGE